SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-494

OVERSEAS MOTORS, Inc., a Michigan corporation,

Petitioner,

-vs.-

IMPORT MOTORS LIMITED, INC., a Michigan corporation, AUDI NSU AUTO UNION AKTIENGESELLSCHAFT (formerly NSU MOTORENWERKE AKTIENGESELLSCHAFT) a foreign corporation, VOLKSWAGENWERK AKTIENGESELLSCHAFT a/k/a VOLKSWAGENWERK GmbH, a corporation of the German Federated Republic and VOLKSWAGEN OF AMERICA, INC. (Porsche-Audi Division), a New Jersey corporation, jointly and severally,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER

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BRIEF OF PETITIONER IN REPLY TO RESPONDENTS' BRIEF

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1975 (Appendix I 5a, 6a) and mailed to Counsel for Petitioner on that date. Petition for Rehearing, (Appendix I 15a thru 21a) was mailed to Clerk on June 16, 1975 by registered mail (Proof of Service, part of certified record) and conceded in Respondents'

Brief page 5 (note 2) Pursuant to F.R.A.P. 26 (c) three days are to be added to the prescribed period to make the filing timely.

RULE INVOLVED

The rule involved for the computation of time is Rule 26 (a) and (c) F.R.A.P.

(a) "In computing any period of time prescribed by these rules, by an order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period shall be included, unless it is a Saturday, Sunday or a legal holiday, in which event the period extends until the end of the next day which is not a Saturday, Sunday or a legal holiday. . . . . ."

(b) omitted

(c) "ADDITIONAL TIME AFTER SERVICE BY MAIL. Whenever a party is required or permitted to do an act within a prescribed period after service of a paper upon him and the paper is served by mail, 3 days shall be added to the prescribed period."

RE-STATEMENT OF ADDITIONAL QUESTIONS INVOLVED

1. Whether this Court has jurisdiction to entertain the instant petition filed within ninety days after entry of an Order of the Court of Appeals denying Motion for Rehearing.
2. Whether the questions presented by Petitioner in this Court were raised in the Courts below.

COUNTER STATEMENT OF THE CASE

In view of the statement of Respondents "that no detailed restatement of the facts as outlined by Petitioner will be made" Petitioner would only state that the conclusion of the Respondents that the facts are "stated fully and accurately by the Sixth Circuit" is erroneous. This was pointed out in Petition for Rehearing in said court; (Appendix I 15a thru 21a) and is further

demonstrated by the record and exhibits as summarized and set forth in Petitioner's Consolidated Brief in the Sixth Circuit (P-Br 1), which is part of the Certified Record on Appeal, at pages 2 to top of page 17, 26 to top of page 28, 30 to middle page 31, bottom page 33 thru to bottom page 47, middle page 49, top page 50, 52 to middle page 57, page 64, top page 67. Further facts are summarized in Petitioner's Consolidated Reply Brief (P-Br 2) at pages 3, top page 4, middle page 5, 7 to middle page 8, bottom page 9 thru bottom page 25, middle page 28, bottom page 34-5.

The Opinion of the Court of Appeals (519 F2d, 123) was entered June 2, 1975 and was sent by mail to Counsel for Petitioner. As an officer of this Court counsel for Petitioner represents that said Opinion was received by him on June 5, 1975. The Petition for Re-hearing in the Sixth Circuit was mailed by registered mail to the Clerk of the Court of Appeals, Sixth Circuit on June 16, 1975 as appears from the Proof of Service, part of the certified record and as conceded in Respondents' Brief in this Court page 5 note 2.

The question of lack of jurisdiction was not raised in the Sixth Circuit by motion of respondents, nor was it raised by the Sixth Circuit Court of Appeals. The Petition for Rehearing was decided on the merits. The Court used the following language (Appendix I 22a): ". . .Upon consideration of said petition, the court concludes that it is without merit." The Petition for Rehearing was denied and the order was entered on July 10, 1975, and the instant petition was filed in this Court on September 30, 1975, as claimed in Respondents' Brief (middle page 4) within the prescribed ninety day period.

ARGUMENT

I.

THIS COURT HAS JURISDICTION TO HEAR THIS PETITION FOR CERTIORARI BECAUSE THE PETITION FOR CERTIORARI WAS FILED WITHIN NINETY DAYS AFTER THE ENTRY OF THE ORDER DENYING THE PETITION FOR REHEARING.

Respondents assert that the ninety day period runs from June 2, 1975, the date of the opinion and judgment of the United

States Court of Appeals and expired September 2, 1975 and was not timely; while Petitioner asserts petition was timely because it was filed less than 90 days from the denial on July 10, 1975 of its petition for rehearing in the Sixth Circuit.

The 14 days within which to file the petition for certiorari, by virtue of F.R.A.P. 26 (c) was increased to 17 days, since it provides that ". .3 days shall be added to the prescribed period," where the paper (Order Denying Motion for Rehearing) was served by mail. Therefore, the prescribed period did not expire until June 19, 1975. Respondents concede on page 5, note 2 of their Brief in this Court that Petitioner's Petition was on file in the office of the Clerk of the United States Court of Appeals two days before, viz on June 17, 1975.

Respondents cite *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.* 344 U.S. 206, 211 (1952) where writ of certiorari was dismissed because petition had not been timely filed. In *United States* v. *Adams* 383 U. S. 39, 41, (1965) footnote 2 respondents there relied on 344 U. S. 206, supra. The court held it was inapplicable since it did not involve a timely motion to amend and said in the footnote (2):

> "Where a timely motion is filed, the time in such cases runs from the date of the order overruling the motion. See *Department of Banking* v. *Pink* 317 U. S. 264, 267 (1942); *United States* v. *Crescent Amusement Co.* 323 U. S. 173, 177, (1944); *Foreman* v. *United States* 361 U. S. 416, 426 (1960).

Respondents also cited *Federal Power Commission* v. *Idaho Power Co.* 344 U. S. 17, 20 (1952). This did not involve a motion for rehearing or a motion to amend a judgment, but involved two different judgments.

In *Bowman* v. *Loperena* 311 U. S. 262, 266 (1940) the court said:

> ". . .But where the court allows the filing and, after considering the merits, denies the petition, (for rehearing) the judgment of the court as originally entered does not become final until such denial, and the time for appeal runs from the date thereof." (citations omitted)

To the same effect is *Gypsy Oil Company* v. *Leo Bennett Escoe* 275 U. S. 498, 499, 1927.

In *Communist Party of Indiana* v. *Whitcomb* 414 U. S. 441, 444-6, (1974) the court held:

> ". . .Appellees' motion for reconsideration of October 3, suspended the finality of the judgment of September 28 until the District Court's denial of the motion on October 4 restored it. Time for appeal thus began to run from October 4, and the notice of appeal filed November 29, was timely."

The following cases cited by Respondents, viz:

Hartford Accident & Indemnity Co. v. *Bunn* 285 U. S. 169, 177-8, (1932); *Gotham Can Co.* v. *United States* 281 U. S. 706 (1930); *Toledo Scale Co.* v. *Computing Scale Co.* 261 U. S. 399, 418 (1923), are clearly inapposite. They did not involve timely post-judgment motions or petitions for rehearings which might have suspended the prescribed appellate time, as in the instant case.

Consequently Petitioner respectfully submits that the petition for certiorari filed by Petitioner herein was timely and should be considered.

II.

THE TIME LIMITATION FOR FILING PETITION FOR CERTIORARI IS NOT JURISDICTIONAL AND IF THERE WAS A FAILURE TO TIMELY FILE, IT DOES NOT BAR THE SUPREME COURT'S EXERCISE OF DISCRETION TO CONSIDER THE CASE.

It is said in *Taglianetti* v. *U. S.* 394 U. S. 316, 1968, foot note 1:

> "Although this petition for certiorari was not filed within the 30 days allowed by the Court's *Rule 22 (2)* the time limitation is not jurisdictional, *Heflin* v. *United States* 358 U. S. 415, n 7 (1959) and does not bar our exercise of discretion to consider this case."

Durham v. *U. S. Or: 1971* 401 U. S. 481, 482

III.

THE ISSUES SOUGHT TO BE PRESENTED, CONTRARY TO RESPONDENTS' CLAIM, WERE PRESENTED TO THE COURTS BELOW.

Respondents in footnote 4 page 7, of their Brief herein refer to a reference that in its Brief to the Sixth Circuit they had made the statement that: "Plaintiff does not contend that the wrong legal standard was applied. . ."; and then asserts that Petitioner did not respond to this in its Brief, etc. We would respectfully call the Court's attention to our Consolidated Brief (P-Br 1 p. 31):

> "Judge Feiken's ruling hereunder were clearly erroneous — since there was no substantial evidence to support them and the court misapprehended the effect of the evidence; AND HE FAILED TO APPLY PROPER STANDARDS TO FACTS" (emphasis supplied)

This was expressly stated in our Brief in this Court (middle page 14) and presumably was read by Respondents.

Petitioner acknowledges it cited *Teti* v. *Firestone Tire & Rubber Co.* 392 F2d 294 (6th, 1968) and *Domany* v. *Otis Elevator Co.* 369 F2d 604 (6th, 1966) respectively as follows:

"It is well established rule that the Court must view the evidence in the light most favorable to the party against whom the motion is made." (*Teti*)

and

"Neither the weight of the evidence nor the credibility of the witnesses is for the court's determination in disposing of motion for directed verdict." (*Domany*)

However, this does not mean that Petitioner accepted those standards in toto. The excerpts are a part of all standards of sufficiency. The nitty-gritty is why the district judge applied the state of Ohio tests of sufficiency rather than the more liberal tests of sufficiency in effect in Michigan where the case was tried as argued in Petitioner's Brief herein (page 8-9). Respondents did not respond to this argument in their Brief.

As to the point raised that Petitioner made no claim in the Sixth Circuit that the directed verdict was inconsistent with the

Seventh Amendment, there are numerous references in Petitioner's Brief (P-Br 1) directly or by implication that the directed verdict was inconsistent with the *Seventh Amendment*. One issue therein was devoted to such inconsistency, (P-Br 1, p. 14, et seq) and specifically stated (P-Br 1, 17):

"The modus operandi, used by defendants to anticipate District Court trial issues and to get Findings of Facts, in the Court of Arbitration, which would bind Plantiff in the District Court, THUS FORECLOSING ITS RIGHTS TO TRIAL BY JURY, of its anti-trust issues, by application of the doctrine of res judicata and collateral estoppel therein, was the identical gambit tried without success in *Beacon Theatres Inc.* v. *Westover U. S. District et al*, 359 U. S. 500 (1958).

The standards opted by Petitioner were those of *Continental Ore Co.* v. *Union Carbide* 370 U. S. 690 (696) (P-Br 1-51) and that under that standard the jury was to be given the benefit of all inferences which the evidence properly supported even though contrary inferences might reasonably be drawn.

Other references that the directed verdict was inconsistent with right to jury trial under the *Seventh Amendment* occur at (Bot. P-Br 1, Bot. p. 18-19; P-Br 1, p. 51-55)

IV.

THERE IS CONFLICT AMONG THE CIRCUITS REGARDING THE APPLICABLE LAW RELATING TO TESTS OF SUFFICIENCY AND THE COURTS BELOW FAILED TO APPLY THE PROPER LAW TO THE EVIDENCE.

Argument under this heading was covered in Petitioner's Brief herein pages 9 thru 16. But certain points are raised which require answer.

Counsel has cited an excerpt from *5 A. J. Moore Federal Practice* at 2330 (2nd Ed. 1975) but did not include the entire section which dealt with this confusing problem. At 2347 of the same work it is said: (50.06)

". . . Nevertheless the divergency among the circuits continues, while the federal courts await authoritative announcement from on high. Many cases are to be found

holding state law to be controlling. And there is equally impressive authority sustaining the supremacy of the Federal Rule. . ."

(citations omitted)

Counsel argues that the Sixth Circuit relied upon *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 452 F. 2nd 1095 (6th Cir.)1971 (cert den. 406 U. S. 919, 1972), which in turn relied on *Brady* and *Continental* and asserts that the Sixth Circuit did not rely at all on either of two cases (*Teti and Domany*) which Petitioner claimed tainted the District Court opinion.

The standard of sufficiency to create an issue of fact for the jury must be the same in the appellate court as in the trial court.

Continental Co. v. *Union Carbide* 370 U. S. 690, 1961 n. 6
Wright and Miller Federal Practice #2524, 542-3

For the Fortner standards to be applicable in this Sixth Circuit Appeal, the Fortner standard should have been used in the district court; and if the standard used by the district court was applicable, the Sixth Circuit should have examined the appeal in the light of the standards applicable to Michigan where the case was tried, rather than the standards of Ohio. That point was covered on pages 8-9 of Petitioner's Brief herein.

CONCLUSION

For the reasons stated, a writ of certiorari should issue to review the opinions and judgments of the Circuit Court of Appeals for the Sixth Circuit and of the District Court for the Eastern District of Michigan, Southern Divison.

Respectfully submitted,

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Dated: November 5, 1975